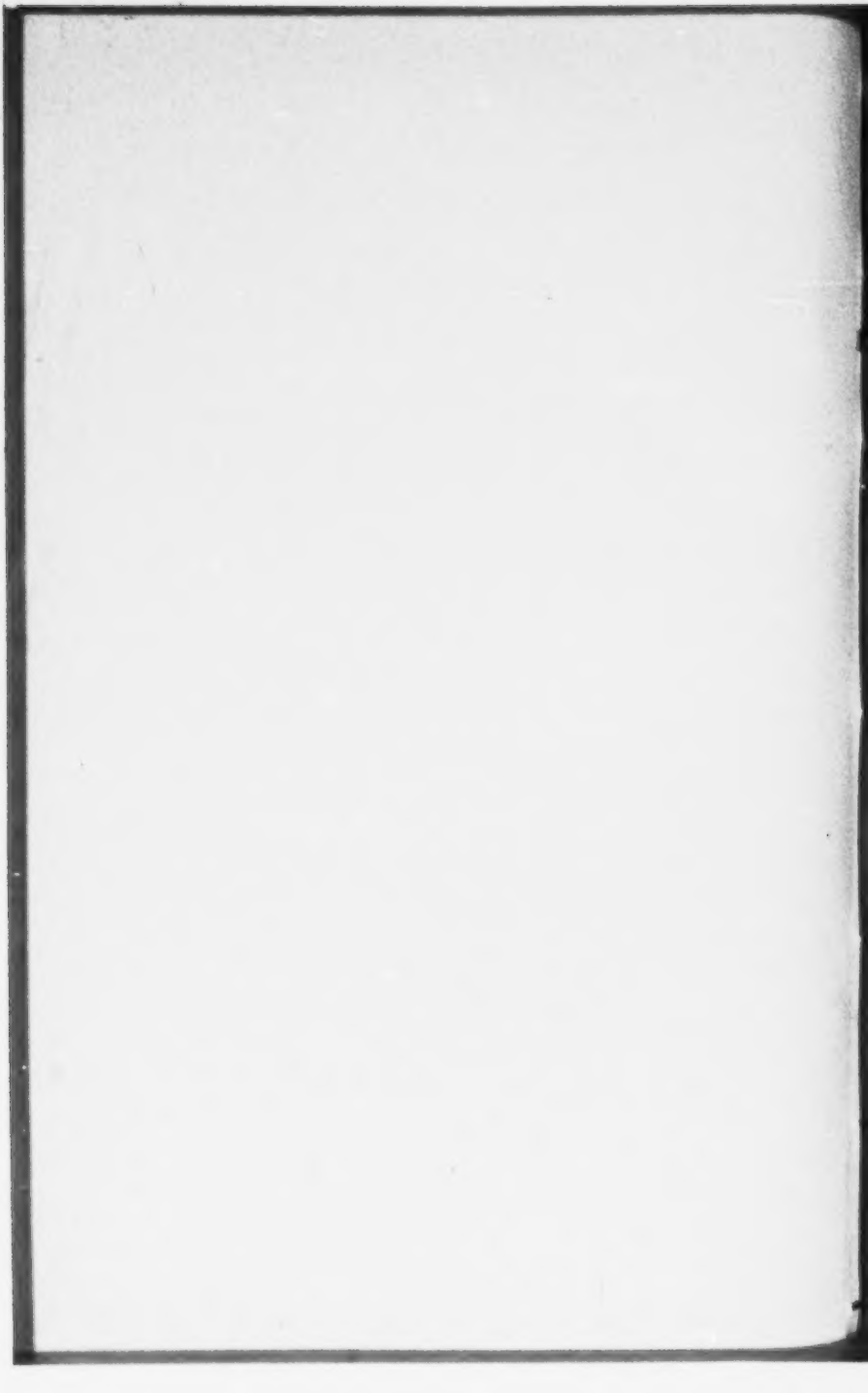

No. 392.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 392.

THE VICKSBURG WATER WORKS COMPANY,
APPELLANT,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

BRIEF FOR APPELLEES.

L. W. MAGRUDER,
Counsel for Appellees.

(18,245.)

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THE VICKSBURG WATER WORKS COMPANY,
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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The Mayor and Aldermen of the City of Vicksburg adopted an ordinance on the 28th day of November, 1886, whereby they granted to Samuel R. Bullock & Company and their successors and assigns the right to maintain and operate in said city a system of water works for the period of thirty (30) years. It contained the usual provisions in reference to the character and kind of works to be built, the manner of construction, the quality and kind of water to be supplied, the pressure to be maintained upon the mains for fire protection, for the payment for the use of the

fire-hydrants, the method of taxation for that purpose, &c. It also embodied a stipulation that the city would pay for the use of not less than eighty (80) hydrants at the rate of sixty-five dollars ($65) per annum for each hydrant, and at the rate of fifty dollars ($50) for all which might be put in in excess of one hundred (100). The ordinance gave to Samuel R. Bullock & Company the exclusive privilege of supplying water to said city and its inhabitants during the period of said contract.

It also provided that the said Samuel R. Bullock & Company might assign all of their rights under the contract to some corporation to be organized by them, which should be effective upon a notice to the city of such assignment.

Afterwards, on the 1st day of March, 1887, the Vicksburg Water Supply Company was organized and an assignment was made to it by Samuel R. Bullock & Company of all their rights under said contract.

On March 1, 1887, the said Water Supply Company, in order to secure the payment of two hundred and fifty thousand dollars ($250,000) of its bonds, executed a mortgage upon the property described as follows: "All of its real and "personal property, goods and chattels now owned or which "may hereafter be acquired by it, including its land, water "works, buildings, pump-houses, stand-pipes, reservoirs, "machinery, pipes, mains, hydrants, apparatus, and equip-"ments situated in the city of Vicksburg, county of Warren, "State of Mississippi, together with all and singular the "tenements, hereditaments and appurtenances thereunto "belonging or in anywise appertaining, and the reversion "and reversions, remainder and remainders, tolls, rent, "issues, income and profits accruing therefrom; also all and "singular the corporate franchises, privileges, rights, liabil-"ities which the water company now has and can exercise "or shall hereafter acquire and possess. And, also, all the "estate, right, title, interest, property, possession, claim and "demand whatsoever, as well in law as in equity, of the

" water company of, in and to the property above described " or hereafter acquired and each and every part or parcel " thereof with appurtenances."

Afterwards M. O. Crumpler and others, desiring to own said water-works plant, bought all of the first-mortgage bonds and proceeded to foreclose the mortgage,* which was done by advertisement and public sale, the mortgage containing a clause that such sale might be made by the trustee named. The sale was made in August, 1900, and at the sale The Vicksburg Water Works Company (the appellant) became the purchaser, said company have been incorporated and organized by the said Crumpler and others for that purpose.

On November 7, 1900, the Mayor and Aldermen of the City of Vicksburg, conceiving, for various reasons, that no legal liability existed on their part to the Vicksburg Water Works Company by virtue of the contract made with Samuel R. Bullock & Company, adopted the following resolution, to wit: "That the mayor be and he is hereby in- " structed to notify the Vicksburg Water Works Company " that the Mayor and Aldermen deny any liability upon any " contract for the use of the water works' hydrants; that " from and after August, 1900, they will pay a reasonable " compensation for the use of said hydrants.

" That the city attorney shall take such action as shall be " necessary to determine the rights of the city in the prem- " ises."

Before that time, on the 9th day of March, 1900, and before the foreclosure of said property, the legislature of the State of Mississippi passed an act by which the Mayor and Aldermen were authorized to issue bonds to the amount of three hundred and seventy-five thousand dollars ($375,000) to purchase or construct, equip, and maintain a water-works

* This purchase was made *after* the passage of the act of March, 1900. Appellant avers that it MADE A PROPOSITION *before that date* (Record, page 6).

system, to construct and establish a sewerage system, to purchase grounds, to equip and erect a city hall, construct the necessary buildings for the hospital medical college, and for other purposes."

It was provided that of said amount one hundred and fifty thousand dollars ($150,000) should be available to buy or construct a water-works system, and that the issue of said bonds should first be authorized at an election to be held for that purpose.

On the 3d day of July, 1900, an election was held in the city of Vicksburg, in pursuance of said act, to determine whether bonds to the extent of three hundred and fifty thousand dollars ($350,000) should be issued by said city in furtherance of the several purposes named. On the 7th day of December, 1900, in pursuance of the resolution adopted by the said Mayor and Aldermen on November 7, 1900, as aforesaid, a suit was filed in their behalf in the chancery court of Warren county, Mississippi, against the said Vicksburg Water Works Company, denying any liability under said contract with Samuel R. Bullock & Company, on the ground that the obligation of the city to take or pay for the use of said hydrants was not embraced or included in the property described in said mortgage, and also upon grounds that the contract had not been complied with by the said Bullock or the said defendants, and also for that the said Mayor and Aldermen were not authorized to make and enter into a contract in the manner in which it had been adopted. In the meantime the Vicksburg Water Works Company, to wit, on the 28th day of October, 1900, obtained what purports to be a quitclaim deed from the Vicksburg Water Supply Company of all of the rights which it held against the city of Vicksburg, including the stipulation to pay rental for the hydrants. A motion to remove the cause to the Federal court was denied by the said chancery court, and thereupon, on the 16th day of February, 1901, appellants filed their bill in this case, and obtained by an *ex parte* order the writ of injunction now in force.

THE PLEADINGS.

The bill of appellant avers that it is subrogated to all of the rights of the Vicksburg Water Supply Company against the said city which had been assigned to it by Samuel R. Bullock & Company. It asserts that it acquired these rights as purchaser at said foreclosure sale, and also by virtue of said quitclaim deed.

It avers that the act of the legislature of the State of Mississippi authorizing an election to be held for the issuance of bonds for certain purposes, of which one hundred and fifty thousand dollars ($150,000) were authorized to be used in the purchase of a system of water works or in the construction thereof, and the act of the Mayor and Aldermen in ordering said election, and the further resolution adopted by it on the 7th day of November, as aforesaid, constituted an impairment of the obligation of its alleged contract with the city.

These acts by the city are charged to be "unjust and unlawful actions by said city, because they assume to abrogate and take away its franchises and contract rights;" that they were adopted "in pursuance of a confederacy and a con-"spiracy to injure and destroy its credit and to destroy the "value of its property;" that they "thereby persistently and "unlawfully endeavored to disable said company from "carrying on its business and to destroy its credit and the "value of its property and to coerce said company to sell its "water works to the city for an inadequate price." There follows in said bill a mass of repetition of these averments in a somewhat confused form, vaguely coupled with irrelevant and immaterial matters, such as that, pending a city election which was held in December, 1900, false and inflammatory "rumors and articles prejudicial to the com-"plainant were originated and circulated by officers and "agents and confederates of said city;" that the suit instituted

by the city in the chancery court of Warren county against said water works company "was a part of said conspiracy to "take away the contract rights of said company and to "coerce it to sell its property for less than its value;" that the Mayor and Aldermen had refused to pay the contract price of sixty-five dollars ($65) per hydrant and only offered fifty dollars ($50) per hydrant, which is also charged to be "an offer to pay an inadequate price;" * * * "that "the city by this offer is confederating, conspiring, and "endeavoring to coerce and enforce it to commit an act "whereby the ordinance will be annulled," claiming that the offer by the city to pay fifty dollars ($50) upon the condition that such payment should not be considered a waiver by the city of its rights in the premises would operate, if accepted, to waive the rights of the complainant. On the 23d day of April, 1901, after an injunction in this case had been issued, a supplemental bill was filed, setting forth specifically the order of the Mayor and Aldermen directing an election to be held to determine whether the sum of three hundred and fifty thousand dollars ($350,000) in bonds should be issued for the purchase or construction of a water-works system, a sewerage system, and a city hall. It is also averred therein that the said election was void and no bonds could be issued in pursuance thereof; that by the contract with Samuel R. Bullock and Company the city was precluded from issuing bonds to build a water-works system of its own. It is nowhere averred in said bill or supplemental bill that the said Mayor and Aldermen designed to build a system of water works or proposed to issue any bonds therefor.

Upon the prayer of the bill the following writ of injunction was issued:

UNITED STATES:

Circuit Court of the United States of the Southern District of Mississippi for the Western Division Thereof.

To the Mayor and Aldermen of Vicksburg, Mississippi, its officers, servants, employés, or agents, attorneys, counsel, solicitors, Greeting:

Whereas a bill of complaint has been lately exhibited in the circuit court for the southern district of the western division of Mississippi, by the Vicksburg Water Works Company to be relieved touching the matters in said bill contained, and praying for an injunction restraining you as hereinafter set forth, and obtained a fiat of the Honorable H. C. Niles, judge, granting said injunction, and bond and security having been given as required by said fiat and statute, we therefore strictly enjoin and command you under penalty of contempt of court that you absolutely refrain from assuming to abrogate and take away the franchise and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business, and to coerce said complainant to sell its water works to the defendant for the said inadequate and arbitrary price, and from otherwise carrying on the unlawful conspiracy set out in said bill of complaint, and from perpetuating any minutes, or resolutions or ordinances of its own, whereby it denies liability or seeks to annul, or refuses to pay complainant contract price for water, and that defendant be compelled to pay the Vicksburg Water Works Company for water used by it as per the ordinance price as aforesaid, and to continue to do so until this cause is heard upon its merits that the rights of all parties may be preserved, and from any further proceedings against said complainant touching any of the matters in said bill contained, until this honorable court shall make another order to the contrary hereof.

In testimony whereof, I, the undersigned clerk of the circuit court of the United States for the southern district of the western division thereof, have hereunto set my hand and affixed the seal of said court at Vicksburg, Mississippi, this the 16th day of February, A. D. 1901.

L. B. MOSELEY, *Clerk.*

[SEAL.] C. D. BANKS, *D. C.*

To the United States marshal for the southern district of the western division of Mississippi, to serve and return.

Received at Biloxi, Mississippi, February 19th 1901, and executed at Vicksburg, Mississippi, by reading this process to W. L. Trowbridge, mayor of the city of Vicksburg, Mississippi, and handing to him a true copy thereof, at the hour of 4.40 p. m. this February 21st, 1901.

F. W. COLLINS,
U. S. Marshal,
By R. O. EDWARDS, *Deputy.*

The injunction including a mandate to the defendants to pay complainant the amount it claimed to be due by the defendants was issued upon an ex parte order and without notice to the defendants of any sort.

On April 30, 1901, several special demurrers and pleas were filed by the defendants, which will be found on pages 49 to 54, inclusive, in the record; but on June 21 the defendants filed their answer (see Record, pages 55 to 68, inclusive) which embraced all of said special demurrers and pleas, and when the court met, on July 3, an order was made granting defendants leave to withdraw said pleas and demurrers, and to file the answer marked by the clerk filed June 21, 1901. At the same time that said answer was filed there was filed a motion to dissolve the injunction (Record, page 55).

Several motions were made by the complainant to strike the pleas and demurrers from the files and to strike the answer from the files, and finally "to require the defendants to elect on which they will stand, whether on demurrers to whole bill or answers."

The court having granted the defendants leave to withdraw the special pleas and demurrers, and to file their answer, all of said motions of the complainant were overruled; so that when the case came on for hearing before the court *it was upon the original and amended bill, the answer of the defendants, and upon said motion to dissolve.*

I desire to make this plain, because the record does not contain the proceedings in consecutive order.

The motion to dissolve is as follows:

"The defendants now come and move the court for a dissolution of the injunction heretofore issued against them and for ground of said motion say:

"1st. Because said injunction was improvidently issued.

"2nd. Because the bill and amended bill filed by said complainants do not raise any question or propound any demand or right cognizable within the jurisdiction of this court.

"3rd. There is no equity upon the face of said bills.

"4th. Because the injunction is in many respects indefinite and vague and so uncertatn that it is not possible to determine what acts are embraced in said injunction.

"5th. Because said injunction should be dissolved by reason of the matters of law and fact set forth in defendants' answer to said bill."

ORDER OF THE COURT.

"Coming on to be heard the motion to dissolve the injunction herein, and the defendants now having moved the court for leave to file the answer, herewith presented and marked by the clerk as filed June 21st, 1901, and to withdraw the pleas and demurrers filed April 30th, 1901, it is ordered that leave be granted to file said answer and withdraw said pleas and demurrers, *but that the question of the jurisdiction of this court to hear the matter in controversy, raised by said answer, shall be first presented and argued.*"

The question of jurisdiction is raised by the motion to dissolve and also by the opening paragraph of the answer, which is as follows:

"They admit that the board of Mayor & Aldermen on November 7th, 1900, adopted a resolution which is in words and figures as follows:

"That the mayor be and he is hereby instructed to notify the Vicksburg Water Works Company that the Mayor & Aldermen deny any liability upon any contract for the use of the water-works hydrants; that from and after August 1900 they will pay a reasonable compensation for the use of said hydrants; that the city attorney shall take such action as shall be necessary to determine the rights of the city in the premises."

But respondents say that this action on the part of the Board of said Mayor and Aldermen "did not assume to abrogate or take away" any of the rights of said complainant existing by virtue of the alleged contract, and it is manifest that no such intention or effect can be imputed to such resolution.

That the said resolution does not seek to destroy or impair any contract, but merely denies legal liability thereunder; that the act of the legislature of the State of Mississippi approved on the 9th day of March, 1900, does not impair the obligation of the contract made with Samuel R. Bullock & Company, as averred in said bill.

That the averments in said bill in this regard do not constitute any ground for relief cognizable within the jurisdiction of this court; that complainant has not averred and set forth in its bill any act having the effect to impair the obligation of said contract, and this court is therefore without jurisdiction to hear and determine the matters in said bill contained."

The following is the judgment of the court:

"This cause coming on to be heard upon the motion to dissolve the injunction heretofore issued in this cause and the court now being advised in the premises and it appearing that there is no Federal question involved in the controversy presented by the pleading, it is therefore ordered, adjudged and decreed that the said injunction be and the same is hereby dissolved, and that the bill of the complainant be and the same is hereby dismissed, and that execution issue therefor for the costs in the case."

WE CONTEND.

The alleged contract of the appellant is not impaired by the act of the legislature of the State of Mississippi approved March 9, 1900, and the resolution of the Mayor and Aldermen:

I. Because it appears from the charter of said city—the law authorizing the contract for water works—that said city was not empowered to grant to appellant the exclusive right to maintain and operate a system of water works.

II. The act of March 9, 1900, does not impair any contract granted appellant under the charter, because:

1. Such is not its legal effect and necessary consequence, for said act merely confers authority either to purchase or to build a system of water works, to build a sewerage system, and to erect a city hall, and for these purposes to issue three hundred and fifty thousand dollars ($350,000) of bonds, one hundred and fifty thousand dollars ($150,000) to be applied to the water works, provided, at an election to be held for that purpose, such issue would be approved by a majority of the electors. The power is discretionary and it must be presumed will be exercised with due regard to the rights of appellant.

2. Because if appellant's rights be contravened in the premises it must result from the building of the works. The result must come from the *exercise* of the *power* and not from the naked grant of such a power.

III. The contract is not impaired by the Mayor and Aldermen in ordering an election to approve the issue of said bonds, for like reasons as above indicated; for notwithstanding said law and said election, the said Mayor and Aldermen have taken no action for the construction of said

works, and have not decided that they would undertake the work.

Indeed, the bill does not charge anywhere that the city intends to build said works, or that it has by any action indicated such a purpose, *nor are they enjoined from building any works.* On the other hand, in their answer said Mayor and Aldermen expressly declare that they have no purpose whatever to take any action in the premises, or even to consider the question until their legal liability, if any, to appellant be first ascertained.

A city cannot be enjoined from taking any action looking to the exercise of an unlawful power. It cannot be enjoined from passing an illegal ordinance or resolution unless passage of the resolution itself might inflict injury.

It can only be enjoined from giving effect to or from carrying out such a resolution.

IV. The resolution adopted November 7, 1900, denying any liability to appellant, is a mere denial of liability and does not seek by legislative force to abrogate or impair appellant's rights, and the resolution of February, 1901, offering fifty dollars ($50) per hydrant is to the same effect.

THE ARGUMENT.

It will be seen upon an examination of the bill that there but are three facts alleged to be done by the city and the State of which can be predicated the contention that the contract claimed by the complainant has been impaired within the meaning of the Constitution of the United States. These are, as before stated:

1st. The passage of said act of the legislature of the State;

2d. The ordering and holding an election in pursuance of said act by the Mayor and Aldermen of the city; and,

3d. The resolution adopted by the Mayor and Aldermen

on the 7th day of November, 1900, denying their liability under said contract, and a like resolution of February, 1901.

It is true that the bill abounds with averments charging vaguely and indefinitely a conspiracy on the part of the Mayor and Aldermen "to injure and destroy the credit of "the Vicksburg Water Works Company, and to destroy the "value of its property, and that it assumed to abrogate and "take away the franchises and contract rights of the com-"pany," and "persistently and unlawfully endeavored to dis-"able said company from carrying on its business" and "to "coerce it to sell its water works to said city for an inade-"quate price." It is also manifest that there is a shallow effort, by such characterization and phrasing, to give fictitious color and effect to the facts set forth. There are many immaterial and irrelevant matters paraded in the same vehicle of phraseology and description. It is sufficient for this argument to say that there is nothing in the bill whatever upon which complainant can base its contention except upon the facts above indicated.

FIRST.

The Exclusive Privilege.

1. *The validity of a claim of an exclusive privilege will be decided on the question of jurisdiction, if the right is determinable by construction upon the face of the law.*

2. *No exclusive privilege was granted to appellant.*

It is claimed by the appellant that the act of the legislature of 1900, authorizing the city to buy or build a system of water works, and certain municipal acts are laws which impair the obligation of its contract. It contends that a contract exists between it and the city of Vicksburg, entered into originally with Samuel R. Bullock & Company; that

said contract was entered into in pursuance of the authority conferred by its charter, which empowered it "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with par.y or parties who shall build and operate water works."

The contract is set forth in an ordinance, by the first section of which it is provided that "the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect with Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works * * * within the corporate limits of the city of Vicksburg."

At the very threshold of this case the question is presented, upon the face of the law and the face of the contract, as to whether or not the appellant has any exclusive rights as against the city to maintain and operate a system of water works. This question must be resolved upon the face of the law and the face of the contract itself. We concede the general proposition, if there be a real and substantial contention as to whether any contract exists, the court will exercise its jurisdiction and dispose of the contention upon a trial, but we submit that the authorities do not sustain the proposition that the court will pass upon the *validity* of every claim which may be set up. The assertion that a contract does exist must be something more than a bare averment. It certainly must appear upon the face of the pleadings that the claim presents a real and substantial dispute. If upon the face of the two laws, one of which is said to impair the rights given by another, it should manifestly and clearly appear that no contract right under the law exists, it surely cannot be said to involve a substantial dispute to be looked to by this court as a part of its jurisdiction.

Two things are essential to the right of invoking the jurisdiction of this court in such cases:

1st. That there must be some contract, some subsisting and legal right; and,

2d. That it is impaired by the law complained of.

It is true that if the facts upon which the legal right or contract is based are seriously disputed, if there be a substantial contention in this regard to be ascertained and determined upon a trial before the court, it will be assumed for the purpose of jurisdiction that such contract does exist, and the validity as to that claim will be passed upon; but in cases such as this, where the single question as to whether any contract right exists at all lies upon the very face of the contract itself, which is set out from the necessity of the case by the appellant in its bill, then it would seem that the question so presented is one of jurisdiction, to be passed upon as such. Nothing more can be done by way of pleading or proof to affect the issues presented as to the validity of appellant's contention for an exclusive privilege. The issue is completely made up. All the law and all the facts are before the court. Nothing can be added to them upon any trial. Its solution rests alone upon the provisions of the law and the terms of the contract.

If appellant has an exclusive right to maintain water works, as provided in the contract, it is a question which can only be resolved by determining the extent of the municipal powers of said city under the act of the legislature authorizing the contract. Whatever rights the appellant has in this respect must be determined *ex vi termini*, by the very terms of the statute. It is not a substantial controversy, the validity of which is to be settled by an adjudication in this court as a part of its jurisdiction. There may be room for discussion as to the extent of the powers of said Mayor and Aldermen in respect to said contract right, but it depends solely upon the interpretation and construction of the powers of the city. The controversy, in order to be "a real and substantial dispute," must possess some other element than that which arises merely from the

construction to be given a statute upon the very face of its terms. Whether the exclusive privilege claimed by the appellant is an obligation which has been impaired by a statute raises a question which must be decided by ascertaining *what are the powers* of the city under one law, and whether these powers have been impaired by another law. The decision of this question, from the nature of things, must involve a comparison of the powers conferred by the two acts. It is therefore a jurisdictional question. It cannot be taken for granted that appellant has an exclusive privilege, however earnestly it may so declare. It cannot claim that its contention raises a real and a substantial controversy, so as to give the court jurisdiction to adjudicate the validity of the claim, because the validity of its claim must be resolved upon the very face of the law which it says has been impaired.

In such a case no good purpose can be served by remanding for trial to the court below the question of the validity of appellant's contract, based upon the interpretation of statute. If upon the face of the statute and of the contract the appellant has no "exclusive privilege," if every fact necessary to its decision is now before the court, why should it not now be determined as a jurisdictional question? If the whole controversy may at once be settled by finding that the appellant has no exclusive privilege, it would be a tedious and costly delay to postpone the determination of that question to a trial upon its merits and a second appeal. Of course, this argument proceeds upon the theory that the act of March, 1890, may impair the charter law of the city, provided said charter authorized the exclusive grant to the appellant. It was not made to appear affirmatively in the case of Grace *vs.* The American Insurance Company, 109 U. S., 278, that the facts as to citizenship conferred jurisdiction. The court of its own motion took notice of the fact, but nevertheless *decided the case upon its merits.*

"As the judgment must be reversed and a new trial had, we have felt it to be our duty, notwithstanding the record, as presented to us, fails to disclose a case of which the court below could take cognizance, to indicate, for the benefit of parties at another trial the conclusion reached by us on the merits." * * *

This is not a case in which it appears "that some title, right, privilege, or immunity on which the recovery depends will be defeated or sustained by a construction of the Constitution," which is the rule laid down in Ames *vs.* Kansas, 111 U. S., 449.

Starin *vs.* New York, 115 U. S., 215, and T. P. R. R. Co. *vs.* California, 118 U. S., 109.

The question here is not whether the act of March, 1900, is unconstitutional because by its effect it impairs the obligations arising under another law, but the question is what is the scope of the powers under the first act, and this does not depend upon a construction of the Constitution.

To make this plain, suppose in the case of Southern Railroad *vs.* California, *supra*, the laws of Congress alleged to be contravened by the laws of the State levying certain taxes had declared that the right of such taxation might be exercised by the State, would it not appear upon the face of the proceedings that the railroad did not possess the right it claimed under the acts of Congress? In this case the construction upon which appellant bases its rights is a construction of the powers of a State law and not of the Federal Constitution.

If it shall appear clearly as a matter of construction that the exclusive grant to appellant was not authorized, there would be no room to apply the Constitution.

Suppose that the act under which appellant claims, and which it has set out, expressly reserved to the city of Vicksburg the power to build its own works, how, in such case, could the Constitution be invoked?

If the effect and meaning of the law, under proper interpretation, did not give to appellant the right it claims, it cannot assert that a controversy exists involving the application of the Constitution. A real and substantial dispute must be an intelligent one, and must involve a constitutional construction.

Where one claims under a grant from a State and the source of his right be a State law, and if, by such law, no such right exists, it cannot be impaired. The contention for such a construction does not involve a Federal question. It is not such a controversy that the court will take jurisdiction of to determine its validity. Its validity will be decided to determine the question of jurisdiction.

In Osborne *vs.* Bank, 9 Wheat., Chief Justice Marshall says, on page 825:

"The appellants say that the case arises on the contract. But the validity of the contract depends upon a law of the United States and the plaintiff is compelled in every case to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made except under the authority of that act. The act itself is the first ingredient in the case; its origin is that from which every other part arises."

What is said above as to that contract as being based upon an act of Congress is equally applicable to the one in this case as taking its life and being from the State law.

In Starin *vs.* New York, *supra*, jurisdiction was denied because the question of the rights of the city of New York depended solely upon charter rights of the city and a construction of the State laws in that regard.

In the case of Benjamin *vs.* New Orleans, 153 U. S., 431, it was decided as a *jurisdictional question* that alleged rights under one statute were not impaired by another.

"The contention was that the holders of these warrants had a right to bring an action at law against the board of police to recover thereon, and that the dissolution of the

board left the complainants without remedy except in a court of equity, judgment and execution at law being required because impossible by reason of the dissolution of the board. Therefore, the court in chancery was appealed to to lay hold of the assets of the board as in the nature of a trust fund and apply them to the payment of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies, and the taxes collected. These were the means provided by law for the payment of debts created by the board, and if they were left unaffected by the repealing act the alleged impairment had no basis to rest on. That act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts if existing laws were ample to effect that purpose. * * * Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies, and tax collections, and that the State courts would so decide. And the bill made no such specific averment, with which, indeed, many of its allegations were wholly inconsistent; while the defense of the city not only rested on no such ground, but the answer denied that the repealing act was susceptible of that construction or could be given that effect."

Directly in point is the case of St. Joseph and Grand Island R. Rd. Co. vs. Steele, 167 U. S., 660. The railroad company filed in the United States circuit court its bill to enjoin the collection of certain taxes levied to tax a bridge as a toll-bridge.

It alleged "that the controversy involved the construction of certain acts of Congress" granting to the company the right to build the bridge across the Missouri river; "that "the bridge was built under these acts, and that all of its

"revenue-producing facilities were derived therefrom, and "that the controversy was over the right to tax this bridge." It was said:

"We cannot accede to the proposition that because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll-bridge the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the circuit court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real substantive question, on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive."

Where parties assert rights which are wholly determined by the State laws, no Federal question is raised.

Romie *vs.* Casanova, 91 U. S., 380.
McStay *vs.* Friedman, 92 U. S., 723.
Goldwashing & Water Co. *vs.* Keyes, 96 U. S., 199.

Jurisdiction will always be denied if "*by legal certainty*" it appears that ground of jurisdiction does not exist.

Wetmore *vs.* Ryner, 169 U. S., 122, and cases cited.

The appellant has no right, except by virtue of the charter powers of the city conferred by the legislature. These must be looked to to ascertain its right, and if upon a fair interpretation they give it no right, it must follow as a "*legal necessity*" that the act of 1900 does not impair it.

The court will take notice:

That there is no claim set up by appellant that any right which it possesses under said contract will be affected by the proposed acts, *except* "*the exclusive right*" to operate water works. The grant of the right to occupy the streets

and of the franchise to operate a system of water works is not affected by the laws complained of.

It may be that the city would be compelled to pay an annual price for the hydrants. The denial of liability for their use under a contract is not, of course, a law impairing a contract. In this respect this case is to be distinguished from—

City R. R. Co. *vs.* Citizens' R. R. Co., 166 U. S., 564.

In the latter case there was a grant to the City Railway Company of the right to use certain streets then occupied by the Citizens' Company, and it was alleged to be impracticable that the same streets could be used by both companies.

The sole question before the court, as to the impairment of the obligation of appellant's contract, is whether the power of the city to build its own works is such an impairment.

The injunction is an injunction against competition by the city, and this brings us to the proposition that—

2. *The ordinance granting to appellant the exclusive privilege to maintain and operate a system of water works was to that extent illegal and void.*

A municipality has no power to grant a monopoly or an exclusive privilege, unless such right is expressly conferred upon it as one of its charter powers.

"The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in Detroit Citizens' Street Railway *vs.* Detroit Railway, 171 U. S., 48, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers, it must be indispensable to them."

Freeport Water Co. *vs.* Freeport City, vol. 180, U. S., 598.

In the case of Walla Walla, 172 U. S., page 14, it is said:

"Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect."

The full extent of the power conferred by the legislature of Mississippi upon the city of Vicksburg was the authority to provide for a system of water works and supply said city with water and an authority to make contracts for that purpose.

There is nothing in this act which authorizes the grant of an exclusive privilege or a monopoly.

THE CASE OF WALLA WALLA DISTINGUISHED.

1st. In the case of Walla Walla, *supra*, there was an express stipulation in the contract that the city itself should have the right to make a contract for a water supply with other parties during the period of said contract if it saw fit.

2d. There was an express stipulation that the city itself would not during the period of that contract build a system of water works and enter into competition with the water company. It will be thus seen, as this case holds, that no monopoly was here created, and it was not illegal on the part of the city to bind itself not to build its own water works.

The case of Grant *vs.* City of Denver is cited in the brief for appellant. Not having been reported, we have not seen it, but we respectfully submit, assuming that it has been correctly quoted that the reasoning and conclusion in this case are not supported by the adjudications. It attempts to follow the doctrine laid down in the case of Walla Walla.

It holds that a contract made by a city for a supply of water embodies by implication a stipulation that it will not build works of its own. It justifies the contract in that case as not granting a monopoly because it "did not grant the exclusive " privilege to the Denver Co.; hence the city did not exceed " its powers conferred upon it by the charter when it made " the contract." Moreover, in order to reach its conclusion, the court did that which we respectfully submit it had no right or power to do. It created for the parties a contract which they themselves did not make. It is a daring assumption to declare from the contract in that case "that it " was within the contemplation of the parties at the time the " contract was made that the city should not have the right " to erect works of its own," and thereby became an obligation of that contract.

The judge says further, " Did the minds of the parties to " the contract ever meet and assent to such a proposition?" meaning the proposition that the city should have said right. In the first place, it is a question of the powers of the city, the method of whose exercise is to be strictly construed. It is not a question as to whether or not the minds of the parties met upon the proposition as put in that case. The question is, Did the minds meet and concur in the proposition that the city should not possess the right to build works? If so distinct and independent a right was agreed to, why was it not expressed, and how is it to be supplied by implication? We respectfully submit that a municipal body cannot be held to surrender so important a power and the rights of the public in so grave a matter by such a far-fetched implication; nor do we see, if the right to make another contract is to be conserved in the public interest by which a municipal corporation may enter into another contract with other parties for a supply of water, why it may not itself build its own works. It is objected that thereby competition would be created. Would not exactly the same result follow if it made a contract with

other parties to build the works? Is it not because of the very fact that *the right of competition is to be preserved in the public interest that an exclusive grant is void under the law unless expressly authorized?*

Suppose in this case there had been, according to the original contract, no stipulation that the city of Vicksburg should pay anything for its fire-hydrants, but that the contract was a bare grant of a franchise to use the streets and to operate a water-works system, would it in such case be held for an instant that it would be precluded from building its own water works? If the city has entered into a contract by which it will be bound to pay for the use of hydrants, that would not deprive it of the power and right to build its own works for the use of its sewers, and even for its fire-hydrants, *provided* they should continue to pay the stipulated rental for the use of the hydrants in case it should be found that they were liable so to pay.

In other words, the franchise grant to the appellant and whatever rights it possesses under that contract for compensation for the use of its hydrants is not involved in this case, because whatever right it possesses in these respects can be enforced notwithstanding the city may build its own water works.

Neither the acts of March, 1900, nor anything done in pursuance thereof by the city have the legal effect to any extent to impair any of the rights of the appellant under his contract, *except the sole right to the "exclusive privilege" mentioned.* If the contract was void in this particular, then it certainly is within the power of the city to make a contract with other parties. The protection of the Constitution cannot be given to avoid the injury resulting from such competition. If the Constitution does not afford protection against competition in one state of the case, how can it be extended in the other? If the city may inflict injury my making a contract with others to build works, why may it not build the works itself? If it shall have the power to authorize

another to do a thing, why does it not possess that power itself, in the absence of any contract to the contrary?

Something has been said about the whims of public sentiment taking shape in municipal action to construct works to the injury of those existing and against which it is well to make provision by contract. It may be well to observe that the limitations upon the exercise of municipal powers are to be maintained for the public good. It is safe to affirm that corporations, in the exercise of exclusive privileges and grants of public franchises, as a rule press to the uttermost their powers of monopoly; that the public are often the victims of a despotic use of such powers. It is safe to affirm that municipalities would not be moved to incur enormous expenditures of money in order to secure certain benefits if they were afforded faithfully and reasonably by those charged with that duty. It may also be observed that those who undertake to enforce the performance of those duties find their paths beset with difficulties such as these corporations know so well how to set up.

SECOND.

1. *The grant of powers under act of 1900 does not have of itself the legal effect to impair the contract.*

2. *Acts of a city cannot be anticipated.*

The act of the legislature and the election held by the Mayor and Aldermen in pursuance thereof do not impair the obligation of complainant's contract, if it has one. Conceding that the complainant is entitled to the "exclusive right" to operate a system of water works for thirty (30) years from the date of its contract, yet it is plain that the act in question does not, nor was it intended by legislative force to, impair complainant's contract. The entire act should be looked to to determine its scope and its

purpose. It was intended to authorize the Mayor and Aldermen to issue bonds to the extent of three hundred and fifty thousand dollars ($350,000) for the purpose of construction of a water-works system, for the building of a city hall, and for the construction of a sewerage system, one hundred and fifty thousand dollars ($150,000) of said amount to be used for the water works. It is plain that this discretionary grant of authority to the city does not have the effect as a necessary consequence of displacing complainant's rights under said contract. It would seem plain that it is not the grant of the power to do a thing which impairs the obligation, nor does the attempted investiture of a city with such authority have that effect. It is the exercise or attempted exercise of the power. It is the *building* of the works which does the injury. If, in addition to the act of the legislature granting such naked power, and if, in addition to the holding of said election by the city in pursuance thereof, the city had taken official action looking to the construction of said works by authorizing bids to be advertised for, or in any way had declared its design and purpose to begin the work, a different case would be presented; but it must be remembered, in the first place, that the bill does not charge the city with any design to build said works or with any act evincing such purpose, and, on the other hand, it was expressly denied by the city. It must be presumed that the city will exercise its powers with due regard to the rights of the complainant. It must be presumed that the election which was held was held for the purpose of building a sewerage system and for building a city hall. It must be presumed that the said power to build a water works company would be exercised under the law at such a time and in such a way as would be consistent with the complainant's rights. Beside this, mere apprehension that illegal action would be taken by the city cannot be the basis of enjoining such action. The municipality cannot be enjoined from passing any resolution or passing any ordinance looking to

the doing of anything. They can only be enjoined from carrying into effect the purpose of such official action.

The following authorities, we submit, sustain the foregoing proposition:

N. O. Water Co. *vs.* New Orleans, 164 U. S., 478.
Chicago *vs.* Evans, 24 Ill., 52.
Des Moines Gas Co. *vs.* Des Moines, 44 Iowa, 505.
1 Dillon, Corporations, § 308.
2 High on Injunctions, § 1246.

THIRD.

The resolution which was adopted on November 7, 1900, by the Mayor and Aldermen simply denies any liability upon any contract for the use of water-works hydrants. It proposed to pay the water works company a reasonable compensation for their use, and it requests the city attorney to take proper legal action to determine the rights of the city in the premises. If this resolution can be construed to have any legislative force looking to an abrogation of complainant's rights, then it will not be possible for any municipal corporation to ever deny any liability under any contract it may have entered into, upon any ground whatever, without being held to have passed a law impairing the obligation of a contract.

We submit that this precise point has been decided in the case of St. Paul Gas Light Co. *vs.* City of St. Paul, 181 U. S., 142.

The contention in the brief for the appellant that, in a bill by the city to have the contract annulled, among other things, it averred that by reason of the resolution of November 7 "said contract no longer exists" is to be considered in interpreting the resolution, is so barren of reason as scarcely to need notice. It is sufficient that the legal effect of any law or resolution is to be determined by its terms, and not by any construction which may be asserted in pleadings.

The averment certainly does not state a correct proposition of law if it be construed to declare that the resolution had the legislative force to annul the contract. If it did have such effect, the suit to annul the contract was a vain proceeding, and of course the averment should be considered in connection with the other averments and the general purpose of the bill and the relief sought.

There is another contention of appellant which, we think, is also equally without any just basis, to wit, that the report of the water committee and the action of the board thereon, taken in February, 1901, whereby an offer to pay fifty dollars ($50) per hydrant was effective as a legislative act to impair appellant's rights. There is difficulty in understanding such a proposition or the supposed reason advanced to support it. It is not conceivable to us how a denial of liability under a contract and an offer to pay a reasonable charge for the use of the hydrants can be viewed as an act having the legal effect to impair the contract.

Again, it is argued in appellant's brief that the proposition to pay fifty dollars ($50) for the use of hydrants pending the litigation, coupled with the condition that the rights of the city should not be thereby prejudiced, possessed some mystical power by which it imparted to the resolution of November 7 the effect to annul the ordinance of 1886, and it is characterized as "a well-laid trap," which, if accepted, would be an acquiescence in the city's demands. 'Tis a fanciful fright of a diseased imagination, conjuring devils from the vasty deep of suspicion. "Methinks it is like a weasel." The legal proposition advanced has no better basis.

The insincerity of this apprehension is made manifest by reference to a letter which the mayor wrote to the water works company, which appears on page 68 of the record, where the proposition is made for a stipulation that the rights of the water company in the premises should not be impaired or waived by accepting the proposed payment of

fifty dollars ($50). (While the record shows this letter to be dated February 14, we are informed that the company did not receive it until the 15th.) Notwithstanding this, the bond in the case was not made and the writ was not issued until the 16th, nor was the writ put in the hands of the marshal until the 19th, and was served upon the 21st, on which latter day, for the first time, did appellee have any notice whatever of the proceedings.

The statement of counsel that the question of jurisdiction was decided by the trial judge upon the bill and the allegations and denials of the answer (*except in so far as the answer raised the jurisdictional question*) is simply not true.

We respectfully submit the foregoing views of our case to the court, and it is our pleasure to feel that they will receive all due and proper consideration.

MAGRUDER, BRYSON & DABNEY,
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L. W. MAGRUDER,
Of Counsel.